IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION No. 03-5609
	:	
v.	:	
	:	
CEDRICK ATKINS	:	CRIMINAL ACTION No. 99-633

MEMORANDUM

Padova, J. **November 8, 2004**

Before the Court is Cedrick Atkins' Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. For the following reasons, the Motion is denied.

I. BACKGROUND

Cedrick Atkins ("Atkins") has brought this Motion based on allegedly ineffective assistance provided by his attorney at trial. Indictment No. 99-633 charged Atkins with four counts: possession with the intent to distribute approximately fifteen grams of a substance containing a detectable amount of cocaine base, in violation of 21 U.S.C. § 841(a)(1) (Count I); possession with the intent to distribute approximately 4.4 grams of a mixture containing a detectable amount of cocaine base, in violation of 21 U.S.C. § 841(a)(1) (Count II); possession with the intent to distribute more than 108 grams of a mixture or substance containing a detectable amount of cocaine base, in violation of 21 U.S.C. § 841(a)(1) (Count III); and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count IV). After a jury trial, he was convicted of Counts III and

IV.[1] On December 7, 2000, the Court sentenced Atkins to 120 months imprisonment on Count III and 63 months of imprisonment to be served consecutively on Count IV, for a total sentence of 183 months imprisonment. Atkins was also sentenced to five years of supervised release, a $3,000 fine, and a $200 special assessment.

Atkins was represented at trial and sentencing by Tariq Karim El-Shabazz, Esquire. El-Shabazz did not file a notice of appeal of the judgment of conviction entered on December 7, 2000. On October 18, 2001, Atkins filed a *pro se* motion to Vacate, Set Aside, or Correct Sentence, under 28 U.S.C. § 2255, alleging three grounds of ineffective assistance of counsel, including one claim that his counsel was ineffective for failing to file a timely notice of appeal. The Government, in its response to the motion, agreed that trial counsel should have filed a timely notice of appeal. The Court granted Atkins' motion on this ground only and vacated the original sentence. Atkins was resentenced on February 8, 2002 to the same sentence of 183 months imprisonment. He was represented by new counsel for his resentencing. The Court instructed the Clerk of Court to file a notice of appeal on behalf of Atkins. The notice of appeal was filed on February 14, 2002. The appeal was

[1]Count I was dismissed after a motion to suppress was granted with respect to the evidence underlying that count. The Court declared a mistrial with respect to Count II because the pertinent narcotics had been destroyed, and the testimony pertaining to Count II was struck from the record. The Government moved to dismiss Count II on August 14, 2000 and that motion was granted on August 15, 2000.

denied and the judgment of conviction was affirmed on February 14, 2003. United States v. Atkins, 58 Fed. App. 904 (3d Cir. 2003). The instant petition was filed on October 8, 2003. An evidentiary hearing was held on June 21, 2004. Atkins was represented by counsel in connection with that hearing.

II. LEGAL STANDARD

Atkins has moved for relief pursuant to 18 U.S.C. § 2255, which provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C.A. § 2255 (West Supp. 2001). "Section 2255 does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors." United States v. Rishell, Civ.A.Nos. 97-294-1, 01-486, 2002 WL 4638, at *1 (E.D. Pa. Dec. 21, 2001) (citation omitted). In order to prevail on a Section 2255 motion, the movant's claimed errors of law must be constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962).

III. DISCUSSION

Atkins asserts two grounds for relief based upon denial of effective assistance of counsel during trial. Atkins maintains that his trial counsel was ineffective in failing to request a jury instruction on the lesser-included offense of possession of a controlled substance. He also contends that his trial counsel was ineffective in failing to move for a mistrial on Counts III and IV after the Court granted a mistrial on Count II.[2]

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, id. at 687, and determined that a defendant claiming ineffective assistance of counsel must show the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

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[2]Atkins' Section 2255 Motion also states a third ground for relief, that his trial counsel was ineffective in failing to object to the trial court's examination of defense expert Michael Perrone. During the June 21, 2004 hearing, the Court pointed out to Atkins that his counsel did object to that examination at sidebar during the trial of this matter and that, at defense counsel's request, the Court gave a cautionary instruction to the jury regarding that examination. Atkins, after consultation with counsel, consequently withdrew this ground for relief. (6/21/04 N.T. 8-11.)

Id. In order to meet his burden of proving ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. The defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 690. "In evaluating counsel's performance, [the Court is] 'highly deferential' and 'indulge[s] a strong presumption' that, under the circumstances, counsel's challenged actions 'might be considered sound . . . strategy.'" Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999) (quoting Strickland, 466 U.S. at 689). "Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, . . . it is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'" Id. (quoting United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

If a defendant shows that counsel's performance was deficient, he then must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. Defendant must

show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

A. Failure to Request a Jury Instruction

Count III of the Indictment charged Atkins with possession with intent to distribute approximately 108 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1). Atkins contends that his counsel was ineffective for failing to request a jury instruction for the lesser included offense of possession of a controlled substance.

At trial, the Government presented the following evidence in support of Counts III and IV of the Indictment. On July 7, 1999, Police Officer Joseph Dalessio observed Atkins running up the 2000 block of South 70th Street in Philadelphia covered in blood screaming "They're trying to assassinate me, they're trying to assassinate me, I've been shot." (6/6/00 N.T. at 116.) Police Officer James Owens, who was also at the scene, asked Atkins what had happened. (Id. at 152.) Atkins said that some guys had tried to rob him and he did not know if they were still in his apartment. (Id.) Office Dalessio and Officer Owens went to Atkins' apartment, at 2018 South 70th Street, and found the door wide open. (Id. at 119.) They also found that the front door to the apartment was covered with blood and that there was blood on a window. (Id. at

120.) Officers Dalessio and Owens searched the apartment to see if the men who had shot Atkins were still in the apartment. (Id. at 152.) They followed a blood trail to a shoebox containing a large chunky white substance which appeared to be crack cocaine. (Id. at 120-21.) That substance was later determined by a police chemist to be 108 grams of crack cocaine. (6/7/00 N.T. at 126-27.) They also observed what appeared to be new and unused drug paraphernalia and packaging in the box containing the crack cocaine. (Id. at 153.) The officers also saw three or four shell casings, two empty gun boxes, two empty gun magazines, and a ski mask in the apartment. (6/6/00 N.T. at 124, 187.) Detective John McGrody, the assigned investigator for this case, went to Atkins' apartment after a search warrant had been obtained. (6/6/00 N.T. at 203.) Detective McGrody found a loaded FMJ Cobray 9mm machine pistol and several magazines under some clothes in the bedroom where the crack cocaine had been found. (Id. at 196-203, 210.)

Atkins' trial counsel, El-Shabazz, called one witness at trial, retired Philadelphia Police Sergeant Michael Perrone. (6/8/00 N.T. at 2.) Perrone, who had worked strictly on narcotics enforcement for approximately six and one-half of his years with the Philadelphia Police, testified as an expert witness regarding crack cocaine. (Id. at 2-6.) Perrone testified that the amount of crack cocaine found in Atkins' apartment was consistent with personal use. (Id. at 21.) He also admitted, under cross-

examination, that when he had been a police officer, he had testified at trial that possession of similar, or smaller, quantities of crack cocaine was consistent with possession with intent to distribute. (Id. at 30-52.)

Atkins contends that El-Shabazz was ineffective for failing to request a jury instruction on the lesser included offense of possession of a controlled substance because there was evidence on the record that he could have possessed the cocaine base found n the shoe box for personal use, rather than for distribution. During the June 21, 2004 hearing, El-Shabazz testified that he had called Perrone as a witness to testify that the crack cocaine could have been possessed for personal use because there is a significant difference in the length of imprisonment Atkins would face if he were convicted of possession rather than of possession with intent to distribute. (6/21/04 N.T. at 17.) He testified that he did not, however, request a jury instruction on possession for the following reason:

> One of the reasons why I can actually recall this case is because of the situation that occurred with Perone [sic] as an expert. When Perone [sic] was questioned regarding some of his earlier opinions when he was a Philadelphia Police Officer, and in fact there were quite a number of transcripts in which he was questioned about lesser amounts or more amounts and whether or not he made a determination as to even lesser amounts were possessed with the intent to distribute as opposed to knowing intentional possession. The effectiveness of his testimony, the weight of his testimony was actually diminished . . .

> . I thought that those points were hurtful to the case . . . . Because it blew up, so to speak, to use that phrase, it seemed to me that it would be best – in the best position of the case not to highlight what had occurred. And that's what I was attempting not to do. I thought that some of the things that happened with Perone [sic] were helpful but I thought that there were many other things that weighed against what we were attempting to do. And I thought that in fact in asking specifically for a lesser included offense or even highlighting any portion of Perone's [sic] testimony that I thought was hurtful might further damage the case.

(Id. at 18-20.) El-Shabazz further testified that he made a strategic decision not to ask for a jury instruction on possession because of Perrone's testimony on cross-examination:

> [A]s a matter of a strategic standpoint when I saw what occurred in this courtroom and I seen [sic] the faces of the jurors as Officer Perone [sic] was talking and he was speaking to them and trying to evaluate how much of his credibility was left with that jury and that's a difficult thing to do, you make a decision. And the decision that I made with respect to this case was to devalue it, not to cut it out because, again, I produced that witness. So not to cut it out, I didn't want to run from it, but at the same time I didn't want to emphasize it, either. So I kind of put it out there. Could another attorney have done it differently, in other words, asked for that instruction? Absolutely . . . . But to not ask for that instruction doesn't seem to me to be inconsistent at all . . . .

(Id. at 26-27.)

In light of all of the circumstances, the Court finds that El-Shabazz's decision not to request a jury instruction for possession of a controlled substance was the result of a reasonable

professional judgment. See Strickland, 466 U.S. at 690. Consequently, the Court further finds that El-Shabazz was not ineffective for failing to request a jury instruction for possession of a controlled substance and Atkins' Motion is denied with respect to this ground for relief.

B. Failure to Move for a Mistrial

Atkins also argues that El-Shabazz was ineffective in failing to ask for a mistrial on Counts III and IV after the Court granted a mistrial as to Count II. Count II of the Indictment charged Atkins with possession of 4.4 grams of cocaine base with the intent to distribute on September 18, 1997. On the second day of trial, the Government presented evidence through Philadelphia Police Officer Brian Reynolds that, at 7:46 a.m. on September 18, 1997, Officer Reynolds and Philadelphia Police Officer Walton observed Atkins sitting in a red chair in the alleyway between the 3900 block of Aspen Street and the 3900 block of Folsom Street. (6/6/00 N.T. at 43-47.) When Atkins saw the two Police Officers, he got up and ran away. (Id. at 47.) The Officers chased Atkins and saw him drop two clear baggies. (Id.) The Officers picked up the baggies, which contained a total of 38 red packets of what they believed was crack cocaine and five blue packets containing what they believed was heroin. (Id. at 47-49, 52.) Atkins was arrested when he stopped running. (Id. at 49.)

After Reynolds testified, the Government informed El-Shabazz

that the drugs recovered on September 18, 1997 had been destroyed. (Id. at 104.) Patrick Askins, Esquire, the Assistant United States Attorney prosecuting Atkins, informed the Court that he had not been aware until that day that the drugs had been destroyed. (Id. at 105-06.) El-Shabazz moved to preclude all evidence with respect to Count II, which motion was denied. (6/7/00 N.T. at 1-9.) He then moved for a mistrial as to Count II. (Id. at 9.) The motion for a mistrial on Count II was granted on the grounds that there would be "significant and severe prejudice to the defendant" if the trial were to continue with respect to Count II. (Id. at 21.) The Court gave the following cautionary instruction to the jury regarding Count II at the close of the evidence:

> Now before we break there is one thing, one bit of update that I have to do. You'll recall that when we started this case there were three counts that were then before us. And we referred to those three counts as Count 2, Count 3 and Count 4. Count 2 dealt with an incident, an alleged incident in September of 1997, that was Count 2. Counts 3 and 4 arise out of [a] July 1999 incident, that's what we've just been talking about with the expert. For sufficient reason Count 2 of the indictment is no longer part of this case. You should not concern yourself with the reasons for that, that has nothing to do with you. This case is now proceeding only on Count 3 and Count 4. And of course Count 3 and Count 4 deal only with the July 1999 incident. Now therefore, since Count 2 is no longer – we're no longer proceeding on Count 2, I instruct you that the evidence that was received pertaining to Count 2 of the indictment is irrelevant. Count 2 is no longer in the case and I am striking that evidence from the record. That's all of the

> evidence with respect to the September 18th, 1997 incident is stricken from this case. That evidence was when it came in and is now totally irrelevant to Counts 3 and 4, because Counts 3 and 4 deal with an entirely separate incident. One that occurred almost two years later in June of – July of 1999. So I have now struck from the record all of the evidence pertaining to Count 2 and I charge you and this charge is of the highest degree mandatory, that that evidence is not to be used by you for any purpose whatsoever in considering the charges against the defendant on Counts 3 and 4. Is that understood?

(6/8/00 N.T., vol. 2, at 15-16.)

Atkins contends that El-Shabazz was ineffective in not asking for a mistrial on Counts III and IV because the jury had to perform a "Herculean" task to disregard all of the inadmissible evidence introduced at trial with respect to Count II and because the similarity of the offenses charged in Counts II and III would create an issue regarding whether the jury could actually follow the Court's limiting instruction. At the hearing on this Motion, El-Shabazz testified that he could not recall why he did not ask for a mistrial on Counts III and IV, and stated that, if the same situation were to occur today, he would ask for a mistrial on all counts. (6/21/04 N.T. at 29.) The Government argues that the Motion should be denied because Atkins cannot establish that he was prejudiced by El-Shabazz's failure to request a mistrial as to Counts III and IV.

The Court cannot find, in light of all of the circumstances, that El-Shabazz's failure to request a mistrial as to Counts III

and IV was "outside the range of professionally competent assistance." See Strickland, 466 U.S. at 690. El-Shabazz's failure to request a mistrial with respect to Counts III and IV must be viewed in light of the Court's strong instruction to the jury that they not consider the evidence admitted with respect to Count II in their deliberations with respect to Counts III and IV. The Court must assume that the jury followed that instruction. "It is a basic tenet of our jurisprudence that a jury is presumed to have followed the instructions the court gave it." United States v. Givan, 320 F.3d 452, 462 (3d Cir. 2003) (citing United States v. Gilsenan, 949 F.2d 90, 96 (3d Cir. 1991)). The Court must also consider the overwhelming evidence introduced at trial, in connection with Count III, that Atkins possessed 108 grams of crack cocaine with intent to distribute. On direct appeal, the United States Court of Appeals for the Third Circuit ("Third Circuit') analyzed that evidence as follows:

> Here, the evidence that Atkins possessed cocaine *with the intent to distribute* was overwhelming. During their search, detectives recovered paraphernalia often used in crack-cocaine distribution, such as new and unused plastic packets, razor blades, straws cut at one end and a candle used as a heat source to heat seal packets for retail distribution. Officer John Brennan, the government's expert witness, testified that the evidence found at the defendant's home was consistent with possession with intent to deliver. According to that testimony, the amount of cocaine base, the residue laden plate, scale, firearms, bulletproof vest and packaging seized were wholly inconsistent with personal possession

or addiction.

Atkins, 58 Fed. Appx. at 905-06 (emphasis in original) (citations omitted). The Court cannot find, in light of the limiting instruction and the overwhelming evidence introduced by the Government in support of Count III, that there is a reasonable probability that, but for counsel's failure to move for a mistrial on Counts III and IV, the result of the proceeding would have been different. See Strickland, 466 U.S. at 694. Moreover, the Third Circuit considered, and rejected, Atkins' claim that he was prejudiced by the introduction of the evidence as to Count II:

> Atkins also attempts to argue . . . that his trial was tainted by the inadvertent introduction of testimony that pertained to a count on which the district court subsequently granted a mistrial. However, at the conclusion of the evidence, the court gave an appropriately forceful instruction in which it told the jury to disregard all evidence. Nothing on this record overcomes the presumption that the jury followed that curative instruction. Therefore, to the extent that Atkins has raised that claim, we reject it as meritless.

Id. at 906 n.2 (citation omitted). Consequently, the Court finds that El-Shabazz was not ineffective for failing to request a mistrial with respect to Counts III and IV of the Indictment and Atkins' Motion is denied with respect to this ground for relief.

An appropriate order follows.

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O R D E R

AND NOW, this 8th day of November, 2004, upon consideration of Cedrick Atkins' Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 92), all attendant and responsive briefing, and the hearing held on June 21, 2004, **IT IS HEREBY ORDERED** that said Motion is **DENIED** in all respects. As Atkins has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability.

BY THE COURT:

S/ John R. Padova

John R. Padova, J.